IN THE

Supreme Court of the United States

October Term, 1968

No. ~~1186~~ 60

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

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Opinions Below

The letter opinion of the Judge of the Superior Court of Bibb County dated December 1, 1967, and filed May 14, 1968 (A. 525)* is unreported. The opinion of the Supreme Court of Georgia filed December 5, 1968, is reported at 165 S.E.2d 160 (A. 537). Earlier proceedings in this same case are reported *sub nom. Evans* v. *Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964), reversed 382 U.S. 296 (1966), on remand, 221 Ga. 870, 148 S.E.2d 329 (1966).

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* Citations herein are to Appendix (A.), except where indicated as citations to original record (R.).

Jurisdiction

The judgment of the Supreme Court of the State of Georgia was entered on December 5, 1968 (A. 546). The Petition for Certiorari was filed March 3, 1969 and was granted May 5, 1969 (A. 548). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), the petitioners having claimed the violation of their rights under the Constitution of the United States.

Questions Presented

1. Whether, in the absence of any reversionary clause in the will leaving property in trust as a park, the imposition by the Georgia court of a reversion to the heirs on a showing that Negroes have used, and must be allowed to use the park, constitutes an infringement by state power on a federal interest declared and created by the Constitution, both by its immediate penalization of compliance with the Fourteenth Amendment, and by its operation to discourage desegregation.

2. Whether the holdings by the state court that this trust has "failed" and that *cy pres* cannot apply, rest on a ground impermissible under the Fourteenth Amendment—the ground that the presence of Negroes frustrates the enjoyment of the park by whites, even though the latter, the intended beneficiaries, may use the park as freely as ever.

3. Whether the racially exclusionary provision in Bacon's will must as a matter of federal law be treated as null and void, first, because it is "incurably tainted" for all purposes by its connection with Georgia Code §69-504; secondly, because it was meant to form and did actually form a part of the public law by which the City conducted its

park; and thirdly, because federal law, commanding equality between the races, commanded and by operation of law brought it about that this park, "dedicated in perpetuity" to whites, must also be taken to be "dedicated in perpetuity" to Negroes.

Statutes Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves the following Georgia statutes:

a. Georgia Code Section 69-504:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

> *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

b. Georgia Code Section 69-505:

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

c. Georgia Code Section 108-202:

Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

d. Georgia Code Section 113-815:

Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Statement of the Case

Petitioners are Negro citizens in Macon, Georgia who have sought in this extended litigation to desegregate Baconsfield Park, a previously all-white municipal park left to the City of Macon by the will of the late United States Senator Augustus Octavius Bacon. The case was reviewed by this Court once before in *Evans* v. *Newton*, 382 U.S. 296 (1966). Petitioners now seek a reversal of a ruling by the Georgia courts that as a consequence of this Court's holding that the Fourteenth Amendment forbids the exclusion of Negro citizens from the park, Bacon's trust fails and the park and other trust property is forfeited by the City and reverts to the heirs of Senator Bacon.

The early course of the lawsuit, which was begun in the Superior Court of Bibb County, Georgia on May 4, 1963, is briefly summarized in the following excerpt from the opinion by Mr. Justice Douglas for the Court, *Evans* v. *Newton*, 382 U.S. 296, 297-298:

> In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573.

This Court, in reversing the judgment of the Georgia Supreme Court, ruled that the park was "a public institution subject to the command of the Fourteenth Amendment,

regardless of who now has title under state law" (382 U.S. at 302).

Immediately after this Court's decision, the Supreme Court of Georgia delivered a second opinion setting forth the view that the purpose for which the Baconsfield Trust was created had become impossible to accomplish and had terminated. *Evans* v. *Newton,* 221 Ga. 870, 148 S.E.2d 329 (1966). However, the judgment did not direct that the Superior Court on remand enter any particular order, but merely ruled that the court should pass on contentions of the parties not previously decided, and said that the "judgment of the Supreme Court of the United States is made the judgment of this Court" (148 S.E.2d at 331).

On remand in the Superior Court of Bibb County, a Motion for Summary Judgment (A. 98) (which was subsequently amended and supplemented by three additional pleadings (A. 360, 462, 468) was filed by Guyton G. Abney, et al. as Successor Trustees under the Last Will and Testament of Senator Augustus Octavius Bacon. The motion asked that the court rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted to movants as successor trustees under Item 6th of Bacon's will, and to certain named heirs of Senator Bacon (A. 103). The motion was opposed by petitioners, Rev. E. S. Evans, et al., the Negro citizens of Macon who had earlier intervened seeking the racially nondiscriminatory operation of Baconsfield Park, by the filing of a response (A. 119) and four supplemental responses to the summary judgment motion (A. 242, 393, 454; R. 971). Petitioners filed numerous exhibits, as well as depositions, affidavits, answers to interrogatories and stipulations setting forth additional facts. Petitioners objected on federal constitutional grounds based on the due process and equal protection clauses of the Fourteenth Amendment, as well

as on state law grounds, to the relief sought by the successor trustees and heirs. The heirs also filed several affidavits and exhibits supplementing the factual record. None of the other parties to the case, including the City of Macon, the Trustees of Baconsfield named by the court's order of March 10, 1964, or the members of the Board of Managers of Baconsfield (who initiated this lawsuit) either opposed the granting of the relief requested in the Motion for Summary Judgment, or offered any evidence. The court heard oral arguments on June 29, 1967, and granted the parties time to file further documentary evidence, which was filed.

At the hearing the petitioners, Evans, et al., suggested that the Attorney General of Georgia should be made a party to the case. By order dated July 21, 1967, the Attorney General was made a party pursuant to Georgia Code Section 108-212 (Acts 1952, pp. 121, 122; 1962, p. 527). The Attorney General of Georgia filed a "Response" opposing the relief requested by the heirs and supporting the position of the intervenors E. S. Evans, et al. that the doctrine of *cy pres* should be applied to save the trust (R. 975-988).

The Superior Court, granted the relief requested in the successor trustees' and heirs' Motion for Summary Judgment, ruling that the trust established by Senator Bacon failed immediately upon this Court's ruling in January 1966, that the City of Macon was dismissed from the case, and that the trust assets reverted to the successor trustees and heirs (A. 517-524). In addition, the court ruled that the doctrine of *cy pres* was not applicable, that there was no dedication to the public, that the heirs were not estopped and that no federal constitutional rights of intervenors were violated by the reversion of the trust assets (*id.*). The Superior Court order and decree was entered May 14, 1968 (*id.*).

Petitioners duly appealed to the Supreme Court of Georgia, which filed an opinion December 5, 1968, affirming the decree of the Bibb Superior Court, and rejected petitioners' federal constitutional claims (A. 537-545). The court below stayed its remittitur and further proceedings pending the disposition of a timely petition for certiorari in this Court (A. 547).

While the record filed with this case includes the entire record of proceedings before this Court on the prior petition, it also includes a good deal of additional factual data and evidence presented to the Superior Court on remand. The evidence develops the history of Baconsfield Park, and shows in great detail the substantial governmental investment, including the expenditure of both city and federal government funds, in establishing, improving and maintaining Baconsfield Park.

The Will

Senator A. O. Bacon provided in Item 9th of his Will (A. 10-31), signed in 1911 and probated in 1914, for the disposition of his farm called Baconsfield. He left the property in trust for the use of his wife and daughters during their lives (A. 118) and provided that after their deaths:

> . . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and

> enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. (A. 19)

The will provided for a seven member all-white Board of Managers to be chosen by the Mayor and Council of Macon (A. 19) and for the Board to have power to regulate the park, including discretion to admit men (A. 20). Senator Bacon directed that a portion of the property be used to gain income for the upkeep of the park (A. 20). He directed that "in no event and under no circumstances" should either the park property or the income-producing area be sold or otherwise alienated, and specified that except for the designated income-producing area the property "shall forever, and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified" (A. 20). The will stated Senator Bacon's belief that Negroes and whites should have separate recreation grounds (A. 21). It also stated his wish that the property be "preserved forever for the uses and purposes" indicated in the will, and that it be perpetually known as "Baconsfield" (A. 21). It provided that the trustees had no power to sell or dispose of the property "under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others" (A. 22).

Item 10th of Senator Bacon's will bequeathed bonds, valued at $10,000, to the City of Macon with directions that the income be used for the preservation, maintenance and

improvement of Baconsfield (A. 22). The will said that if the City was without legal power under the city charter to hold the funds in trust, the City should select a successor trustee (A. 24). Bacon gave a similar direction for the City to select a successor trustee "if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground . . ." (A. 24).

In a 1913 codicil, Senator Bacon noted that one of his daughters, Mrs. Augusta Curry, had predeceased him, and provided that her children should stand in her place in the disposition of the property, except that with respect to Baconsfield their interest would cease upon the death of his wife and his other daughter (A. 29-30). Item 3rd of the codicil provided, *inter alia*:

> To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks (A. 30).

In Item 4th of the codicil, it was provided that Custis Nottingham, one of the trustees and executors under the will, and his family, could occupy a house on Baconsfield rent-free until the full expiration of the trust for which he was appointed (A. 30).

The City of Macon Acquires Baconsfield—1920

The City of Macon obtained possession of Baconsfield in February 1920, many years before the death of Senator Bacon's surviving daughter, by virtue of an agreement

between the City and the trustees under the will, which was entered into with the written assent of all of Senator Bacon's heirs. The agreement is set forth in the Macon City Council Minutes of February 3, 1920 (Intervenors' Exhibit O; A. 405-407). Under the agreement between the City and the trustees, which recites that it was executed with the signed assent of all legatees and beneficiaries of the Bacon estate, the trustees conveyed Baconsfield to the City by deed, and also conveyed to the City to be covered into the City treasury the bonds and accumulated interest bequeathed by Item 10th of the will (*Id.*). The deed of Baconsfield to the City appears in the record as Intervenors' Exhibit F; it was executed February 4, 1920, and recorded February 10, 1920 (A. 353). In the agreement the City agreed to pay the trustees the sum of $1,665 annually during the life of Senator Bacon's daughter, Mrs. Sparks (A. 405-407). The City also agreed that it would appropriate 5% of the sum of the value of the bonds and accumulated interest each year, or $650 annually, for the improvement of Baconsfield Park (*Id.*). The City agreed not to charge any taxes or other assessments of any kind against the property (*Id.*). At the same time the City agreed with Custis Nottingham that he would terminate his occupancy of a house in Baconsfield in consideration of a cash payment of $5,100 from the City of Macon (Exhibit O; A. 405). Nottingham's Quit Claim Deed to the City is Intervenors' Exhibit G (A. 357).

The City of Macon paid $5,100 to Custis Nottingham in consideration of his deed of his interest in Baconsfield (A. 405). The City of Macon paid the trustees under the will an annuity each year during the life of Mrs. Mary Louise Bacon Sparks. The Baconsfield annuity payments of $1,665 per year were regularly included in the Macon City budgets. (See, for example, budgets for the years 1939 and

1940, Intervenors' Exhibits T and U; A. 416, 417). Mrs. Sparks lived until May 31, 1944 (Intervenors' Exhibit W; A. 456). Accordingly, there were 25 payments of $1,665 from February 1920 through February 1944, and the City of Macon thus paid a total of $41,625 to the trustees under Bacon's will in order to acquire Baconsfield during Mrs. Sparks' life.

The Macon City Council Minutes of February 17, 1920 (Intervenors' Exhibit P; A. 408), reflect the fact that the City had taken over Baconsfield Park; that the council elected the first Board of Managers; that the Mayor of Macon, G. Glenn Toole, was elected to the Board of Managers; and that this election of the Mayor was requested by the trustees under Bacon's will, Messrs. Jordan and Nottingham, who wrote a letter to the Mayor stating:

> In turning over to the City of Macon the park devised to it by Senator Bacon, permit us to express the hope that this Park will mean all to the white citizens of Macon that Senator Bacon wished it to mean.
>
> The place is one of great natural beauty, but it could easily be marred by haphazard work. We are sure that before anything material is done to this property that you, the City Council, and the Commission appointed by it will have a well defined and permanent plan of improvement in view.
>
> We believe that it is of the utmost importance that you be a member of this Commision, and wish here to voice the hope that you will not decline such service from any false modesty. *It will greatly expedite the people's enjoyment of this property if the Commission is headed by the head of our City Government.* Differences in opinion and change of plans will be thus avoided, and the money essential to the improvement of this property will be expended by the one charged with raising it. (A. 408-409; emphasis added).

Mr. Toole who was Mayor of Macon from 1918-1921 and from 1929-1933 (Heirs and Trustees Exhibit E; A. 463), remained a member of the Board of Managers until 1945. (Intervenors' Exhibit B, Baconsfield Minutes of May 30, 1945, and November 1, 1945; A. 268, 271, 273-274).

City Administration and Financial Aid to the Park and Federal Government Aid

Mr. T. Cleveland James was Superintendent of Parks of the City of Macon from 1915 to the time of his Deposition in April 1967 (A. 206). He developed most of Macon's parks, including Baconsfield and exercised "general supervision" over Baconsfield for many years. (A. 205). He testified that Baconsfield was a "wilderness" with "undergrowth everywhere" and no facilities at the time the Mayor directed him to take charge of the park (A. 199-200; 202; 218). Supt. James initially developed Baconsfield Park using workmen who were paid by the federal Works Progress Administration, an agency of the United States (A. 203-205). The W.P.A. men were working at Baconsfield under his supervision for a period he estimated as a year or more (A. 203-205; 218). The federally paid workmen cleared the underbrush, cleared foot paths, built footbridges, dug ponds, built benches, planted trees and flowers and generally performed landscaping work in Baconsfield Park (A. 201-207). The W.P.A. workers did similar work in other city parks under the supervision of the City Park Superintendent (A. 213). Mr. James' testimony is supplemented and corroborated by W.P.A. records from the archives of the United States (Intervenors' Exhibit E; excerpts at A. 347-352) which reflect that Works Progress Administration Work Project No. 244 involved landscaping city parks in Macon, Georgia under the supervision of the City Park Superintendent. The W.P.A. records indicate that W.P.A. Project No. 244 was ap-

proved August 7, 1935; that the federal government paid $120,032.35 for 469,079 man hours of work; and that the sponsor (City of Macon) paid $17,923.43 for work on the project (A. 349). The W.P.A. records do not indicate how much of the labor was at Baconsfield and how much was at other city parks. But, Mr. James' testimony indicates that W.P.A. work at Baconsfield was very extensive (A. 218):

> Q. Will you describe for us very briefly what you meant when you said Baconsfield Park was a wilderness when you first went out there? A. Well, there wasn't nothing there but just undergrowth everywhere, one road through there and that's all, one paved road.
>
> Q. And no facilities out there; is that correct? A. No.
>
> Q. And how long did it take you to turn it into a usable park? A. Oh, about 6 or 8 months, probably a year.
>
> Q. I see, and you used employees fairly regularly during all of that year? A. Yes.
>
> Q. Every day? A. Well, we had the PWA labor, trying to get me to give them something to do, you know, and I worked them over there.
>
> Q. You say you used the PWA employees for maybe a year? A. I expect I did, yes, that is what I did my work with.

The minutes of the Baconsfield Board of Managers meeting held March 30, 1936 (Intervenors' Exhibit B; A. 248), indicate that considerable development, landscaping and planting had been done in the park during the preceding 12 months. No earlier minutes of the Board are available (A. 247). However, the Board minutes indicate an extensive pattern of governmental involvement in the

maintenance of the park from 1936 until the City resigned as trustee of the park in 1964. (The minutes from 1936-1945 are Exhibit B, R. 506-565; see excerpts at A. 246-275. The minutes from 1945-1967 are Exhibit A, R. 376-505; see excerpts at A. 276-346). The City's involvement in the operation of the park was manifested in a great number of ways. For example, for a twelve year period from 1936 to 1948, all but one of twenty-one meetings of the Board of Managers of Baconsfield took place in the Mayor's office or elsewhere in Macon's City Hall. During the same period the Mayor of Macon attended 16 of the 21 meetings. (See, generally, Intervenors' Exhibits A and B *supra*; A. 246-346). The minutes reflect that over an extended period of years the Board of Managers frequently requested and obtained assistance from the City of Macon in developing and improving the park. The minutes of the Board of Managers refer to Baconsfield as "one of the outstanding municipal parks in the Southeast" (A. 294), and to "Baconsfield and the other public parks of the City of Macon" (A. 274).

The deposition of Park Superintendent James and the Board of Managers' minutes indicate positively and conclusively that Baconsfield Park was maintained and operated as an integral part of the City park system from the time the park was first developed until the City resigned as trustee in 1964. Park department employees under Mr. James' supervision maintained Baconsfield just as they did all of the other city parks (A. 200-201; 208; 217-218). Mr. James estimated that the City spent about $5,000 for flowers and plants in Baconsfield during the years he worked there, and additional amounts were spent by the Board of Managers for gardening supplies (A. 211). In 1938, the United States government gave to the park 144 bamboo plants representing six different varieties of bamboo (A. 252). Mr. James regularly assigned men from the

city Park Department to work in Baconsfield as the need arose (A. 200-201). City workers did all the general maintenance work in the park until 1964 (A. 200-201). For a period of years, Mr. James, the City Superintendent of Parks, lived in Baconsfield Park, occupying a home rent free (A. 290). The substantial value of the city's contribution of labor for upkeep of the park is demonstrated by the increase in the board's maintenance expenditures after the City resigned as trustee of the park in 1964 (A. 235). The amounts spent by the Board of Managers for maintenance in the years 1960-1966 were as follows:

1960 — $1,307.20
1961 — $1,645.72
1962 — $1,995.57
1963 — $1,465.20
1964 — $6,545.78
1965 — $7,073.80
1966 — $6,675.89

(Computed from Answer to Interrogatory No. 9; A. 135-136.) The Chairman of the Board of Managers agreed that the cost increase in 1964 and thereafter was attributable to the fact that the City withdrew its services, and it became necessary for the board to pay for services which had previously been furnished by the City Parks Department (A. 235). The Mayor of Macon ordered all city employees to stop working at Baconsfield after the City resigned as trustee in 1964 (A. 176-177).

Baconsfield Clubhouse—Built by Federal Government

There is a two story brick building known as the Baconsfield Clubhouse located in the park. The clubhouse was built in 1939 by the Works Progress Administration (W.P.A.), an agency of the United States (Intervenors' Exhibits J (A. 403-404). K (R. 724-841; excerpts at A. 419-442), L

(R. 842-846), M (R. 847-910; excerpts at A. 443-453), N (R. 911-913) and R (A. 413-414)). The clubhouse construction project was sponsored by the City of Macon acting in conjunction with a private group known as the Women's Clubhouse Commission. In its application for federal funds for this project, the City of Macon, by its Mayor and Treasurer, executed numerous documents constituting agreements, assurances, certificates, representations and contracts which are contained within the W.P.A. records (Intervenors' Exhibits K (A. 419-442) and M (A. 443-453)). The City in several documents represented to the United States that the City was the sole owner of the Baconsfield Park property (R. 774, 788-789), *that the City's ownership was "perpetual,"* (A. 449), *that there were no reversionary or revocation clauses in the ownership documents* (R. 789; A. 449), that the property was not private property (id.), and certified that proposed clubhouse project was "for the use or benefit of the public" (R. 796, 808; A. 434, 451). Federal funds totaling $16,512.80 were expended to construct the clubhouse (see Intervenors' Exhibits L (R. 842-846) and N (R. 911-913)). The city officials signed documents indicating that the sponsor's (City's) share of construction costs would be financed out of the "regular tax fund with the assistance of the Women's Club of Macon" (Intervenors' Exhibit K; R. 774). The Women's Club had agreed to contribute $3,000 (Intervenors' Exhibit R; A. 413). The sponsor's (City's) share of the construction costs finally amounted to $8,376.91 (R. 846, 913). The total costs of the clubhouse, including the federal contributions ($16,512.80; R. 845, 912) was $24,889.71 (Intervenors' Exhibits L and N).

In a sworn certificate executed under oath by the Mayor and Treasurer of the City of Macon on October 14, 1938, quoted in full below, the City promised that there would be

no discrimination against any group or individual in the use of the clubhouse or the property upon which it was located, and *that the City did not intend to lease, sell, donate or otherwise convey title or release jurisdiction* of the property during the useful life of the improvements built with federal funds. The certificate contained in Intervenors' Exhibit K, reads as follows (A. 440-441):

> With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as "Baconsfield Club House" will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.
>
> It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon, during the useful life of the improvements placed thereon through the aid of W. P. A. funds.
>
> It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the public, and will not be used for the profit or benefit of any one individual or specific group or organization; and

the management of the property, together with improvements made thereon, will at all times be subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to.

/s/ CHARLES L. BOWDEN
Mayor, City of Macon, Georgia

/s/ FRANK BRANAN
Treasurer, City of Macon, Georgia

Another similar certificate or agreement containing assurances that the property "will not be leased, sold, donated or otherwise disposed of to any private individual or corporation, or to a quasi-public organization during the operation of the project" and would be "maintained by the Women's Club and operated for the benefit of the general public," was executed September 7, 1938, by the Mayor and Treasurer of the City of Macon and by the President and Treasurer of the Women's Club House Commission (Intervenors' Exhibit M at A. 453).

The Women's Club continues to occupy the clubhouse in Baconsfield Park, using the building free of charge and without paying rent either to the City or to the Board of Managers. The Women's Club charges fees for various organizations which use the building for meetings, but none of these funds go to the City or to the Board of Managers (A. 159-164; 221-222; 232-234). Mayor Merritt of Macon testified that he has attended meetings at the Clubhouse of such organizations as the Georgia Legal Secretaries Association, the Georgia Milk Dealers Association, and several other local associations of various types (A. 161-163).

The minutes of the Board of Managers of Baconsfield indicate that the Board permitted the Highland Hill Baptist Church to use the Baconsfield Clubhouse as the temporary meeting place for the church during the construction of the church. The Board voted this permission for the church to use the Clubhouse at its meeting of June 25, 1953, notwithstanding its attorney's advice that this use was not permitted by Senator Bacon's will (Exhibit A, Minutes of 6/25/53; A. 296-298). A letter from the Chairman of the Board of Deacons of Highland Hill Baptist Church thanking the Board for the use of the Clubhouse as a meeting place for the church was read at the Baconsfield Board meeting of May 17, 1955 (Exhibit A, Minutes of 5/17/55; A. 311).

Public Roads in the Park

Certain roads running through Baconsfield Park were paved and developed by the City (A. 167-169; 202-203; see also Intervenors' Exhibit A, Minutes of 5/17/55 (A. 312-313). On several occasions the Board of Managers resolved to seek federal funds for the paving of roadways in the park, but the record does not indicate whether any federal highway funds were actually obtained (see Intervenors' Exhibit B, Minutes of 3/30/36 (A. 247-248); 6/28/38 (A. 253); and 10/12/38 (A. 247-248)). On one occasion the City paid the Board of Managers the sum of $1,000 as "partial reimbursement from City of Macon for paving in Baconsfield." (Intervenors' Exhibit A, financial statement following Minutes of 10/16/47; A. 393).

City-Built Swimming Pool and Bathhouses at Baconsfield

As early as 1936, the Board of Managers of Baconsfield began discussing the desirability of constructing a swimming pool in the park, and the discussion of government

aid for a pool continued for years (Intervenors' Exhibit B, Minutes of 6/29/36 (A. 249), 7/30/36 (A. 251), 12/7/36 (R. 517), 12/14/44 (A. 260), 5/30/45 (A. 262-268)). Finally, on June 3, 1947, the Chairman of the Board of Managers met with the Mayor and several aldermen of Macon and "strongly urged" that the City appropriate $100,000 to build a pool in Baconsfield. (See Intervenors' Exhibit A, Minues of 6/3/47; A. 281-282). The City agreed to this suggestion and on July 22, 1947, resolved to deliver the sum of One Hundred Thousand Dollars to the Board of Managers of Baconsfield to be used by the Board for the construction of a swimming pool. (Intervenors' Exhibit I; A. 389; see also, Intervenors' Exhibit V; A. 418.) Subsequently, the City appropriated an additional Forty Thousand Dollars on December 23, 1947 to the Recreation Department to construct bathhouses at Baconsfield pool (Intervenors' Exhibit I; A. 389). The Baconsfield minutes indicate that the Board of Managers accepted the $100,000 grant and designated the Chairman and Secretary of the Board of Managers and the Chairmen of the City Council's Finance and Recreation committees to act as agents to construct the pool and disburse the funds from a special swimming pool account. (Intervenors' Exhibit A, Minutes of 8/4/47; A. 285-287.) A large community swimming pool and adjacent buildings were constructed in 1948 on a portion of the Baconsfield land designated in Bacon's will as income-producing property. After the pool was constructed the Board of Managers and the City entered into a contract by which the pool was leased by the Board to the City for a two year term, to be automatically renewed for successive two year terms unless either party terminated the lease or the City breached its covenants (Heirs' Exhibit D; A. 384-388). The City agreed to operate the pool:

> . . . as a part of the pleasure and recreational facilities of Baconsfield, for the enjoyment and benefit of

> the beneficiaries of the trust for Baconsfield, as set up and established in the said last will and testament of the said A. O. Bacon, deceased, and also for other persons who are or may be admitted to Baconsfield (A. 385).

The City agreed to bear any losses in connection with the pool operation, and to share any profits with the Board. No payments to the Board were made under this provision (Heirs' Exhibit H and attached letter; A. 470-474). The City made additional capital expenditures at the pool and related facilities over the years for improvements, including the following amounts (Heirs' Exhibit H; A. 473):

1948	$ 4,999.57
1960	6,079.21
1962	6,360.55
	$17,439.33

The sum of $1,084.93, which remained in the old swimming pool account was transferred to the regular account of the Board of Managers in 1959. (Intervenors' Exhibit A, Minutes of 5/8/59; A. 326, and financial statement following Minutes of 10/29/59; R. 456.)

The pool was finally closed and the lease cancelled in 1964 in order to avoid racial desegregation as required by the Fourteenth Amendment. In April 1963, following attempts by Negro groups to integrate the park, the Board resolved to cancel its contract with the City relating to the pool and to attempt to negotiate a contract with a private party for operation of the pool (Minutes of 4/9/63; A. 334-335). At the same time, the Board directed its attorneys to commence this lawsuit to remove the City as trustee (*Id.*). The swimming pool contract was finally cancelled

in May 1964. The Board's attorney wrote a letter to Mayor Merritt dated May 22, 1964 (Intervenors' Exhibit X; A. 458-460) stating that it was cancelling the pool lease because of the City's inability to enforce racial segregation at the pool. The Mayor replied by letter dated May 28, 1964 (Intervenors' Exhibit Y; A. 461), acquiescing in the termination and relinquishing control of the pool to the Board of Managers. The swimming pool has remained closed since that time, and has not been maintained or kept in repair since 1964. Nearby highway construction which interfered with the pool area during a period of time has now been completed, but the pool remains closed.

City Operated Zoo

The City established a zoo in Baconsfield Park, with caged animals, including monkeys, a bear, ducks, rabbits, a raccoon, a few deer, and a few peafowl and pheasants. (Answer to Interrogatory No. 2; A. 133.) Mayor Merritt stated that the zoo included 40 or 50 monkeys (A. 154). The zoo was closed and all the animals and cages removed after the City resigned as trustee in 1964. While the zoo was in operation the City employed a full-time employee at Baconsfield to take care of the animals (A. 155-156; 201, 208). The Public Works Department of Macon dismantled the zoo (R. 208).

Public School Playground

A playground in the Baconsfield Park is regularly used as the school playground for a nearby public school operated by the Bibb County Public School System (A. 173-174). The school is Alexander School Number 3, a previously all white elementary school, which it was anticipated would be attended by a small number of Negro pupils living in the neighborhood under the school district's desegrega-

tion plan. (Intervenors' Exhibit W, Stipulation No. 2; A. 456-457.) The school personnel supervise the children in using the playground in Baconsfield (A. 173-174; 178-179). The Bibb County Board of Education was responsible for having the playground installed, including basketball courts (A. 180, 192). Prior to 1964, the City Recreation Department had an employee assigned to the playground at Baconsfield to supervise the children. The City spent an average of $1,180.70 per year to employ someone at the playground prior to February 1964 (A. 175-179).

City Leased Building

From 1954 until the present time, the City has leased a building referred to as the Open Air School from the Board of Managers and paid the Board a rental of $300 per annum. (Exhibit A, Minutes of 6/24/54; A. 301; A. 181-184.) This is a one story brick building located in the portion of the Baconsfield property set aside for raising revenue (*Id.*). The City in turn makes the building available, free of charge, to the Macon Young Women's Civic Club for the activities of the "Happy Hour Club," an organization of elderly people (*Id.*). The building was previously occupied by the Board of Education rent free (Intervenors' Exhibit B, Minutes of 7/10/41; R. 541).

City-Aided Recreation Facilities

A Little League baseball field located in the park was constructed in part with the aid of the City which dumped 100 to 200 truck loads of dirt in a low area of Baconsfield where the field is now located (A. 164-165). The financial records of the Board indicated that it made a "part payment" to the City for filling in the play area in the amount of $3,500. (Exhibit A, financial statement following Min-

utes of 12/18/56; R. 437.) The minutes do not indicate any subsequent payments.

Several tennis courts are maintained in the park. The City of Macon assisted in installing lights at the tennis courts to permit play at night. (A. 169-170; Minutes of 7/24/62; A. 330.) In 1964, the Board of Managers granted to the Macon Tennis Club, a private club, permission for the club to regulate play at the Baconsfield Tennis Courts according to the rules of the club, and permission to maintain the tennis courts. (Intervenors' Exhibit A, Minutes of 4/10/64; R. 492.)

Sale of Portion of Trust Property to State

During World War II, when informed that the War Department wanted a strip of land to open a roadway, the Board and the City sold a strip of land from the area of Baconsfield devised by Senator Bacon as income-producing property to the State Highway Board of Georgia. (See the deed and attached resolutions, Intervenors' Exhibit H; R. 655-660.) The Board of Managers received a check in the amount of $1,500 from the City of Macon in this transaction. (Intervenors' Exhibit B, Minutes of 3/3/42; R. 542-543, and financial statement following Minutes of 12/15/44; A. 261.)

Tax Exemption

The Board of Managers has never paid any taxes, federal, state, or local, on the Baconsfield property or on any of the income they have received. The property has always been treated as exempt from taxes under Georgia laws. (See Financial Statements in Intervenors' Exhibits A and B, *passim*; see also A. 184, 196.)

Income Property

The income-producing area of the trust property now includes a shopping center with several business, including a filling station, pharmacy, ice cream store, etc. The rental income of the Board of Managers during calendar year 1966 was $7,058.37. (Computed from Intervenors' Exhibit C; R. 569-592.) The rental income received during the period April 1, 1963, to March 31, 1964, was $5,225.04 (R. 346). During the years the Board also has received payment for various types of utility easements on the property. In 1958, the Board received $3,500 from the City Board of Water Commissioners for a sewer easement. (Intervenors' Exhibit A, financial statement following Minutes of 5/8/58; A. 324.) The State Highway Department acquired 26.932 acres of land in Baconsfield by condemnation proceedings in 1964 to construct a portion of Interstate Highway 16. (Heirs' Exhibit I; A. 476.) The Board of Managers was awarded the sum of $131,000 in the condemnation, and the Court ordered that sum paid to the Chairman of the Board of Managers to be invested in short-term government bonds and to be held subject to the further order of the court pending the outcome of proceedings in the instant case (*ibid.*).

Assets of the Estate

The assets as of April 17, 1967, held by the First National Bank & Trust Company in Macon, as agent for the Board of Managers of Baconsfield, were stated by the Bank as follows (Intervenors' Exhibit D; R. 594):

"ASSETS:

Cash:		
Principal Cash Overdraft	$ 266.44	
Income Cash Balance	9,443.67	
		$ 9,177.23
Property:		
Real Estate	255,000.00	
U. S. Treasury Bonds	136,434.98	
Savings Account First National Bank	7,795.05	
		399,230.03
Total Assets		$408,407.26
LESS:		
Real Estate	255,000.00	
Highway Right of Way Fund	143,766.92	
		398,766.92
Rent Accumulation		$ 9,640.34"

The original trust fund of $10,000 in bonds left by Senator Bacon, was long ago "depleted" according to the City (City's Answer to Interrogatory No. 13; A. 116).

An accounting filed by the successor trustees with the court below on June 3, 1968, showed the total trust assets to be $404,810.77, including a book value for the real estate of $255,000 (R. 1055).

How the Federal Questions Were Raised and Decided

The petitioners' federal constitutional objections to the order of the court below ruling that the Baconsfield Park property had reverted to the heirs were stated in their Response to the motion for summary judgment (A. 119-122) and in their several supplemental responses (A. 242,

393, 454; R. 971). The federal constitutional objections were repeatedly and elaborately articulated. The following excerpts from the Supplemental Response and the Second Supplemental Response represent the general thrust of petitioners' argument as stated to the Superior Court:

> The entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon would violate the intervenors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, in that:
>
> (a) A Judicial decree of reversion would not implement the intent of Senator Bacon's will, which expressed the legally incompatible intentions that (1) Negroes be excluded from Baconsfield Park, and (2) that Baconsfield Park be kept as a municipal park forever. A judicial choice between these incompatible terms must be made in conformity with the said Fourteenth Amendment. The affirmative purpose of the trust, to have a park for white people, will not fail if the park is opened for all, and for the court to rule that the mere admission of Negroes to the park is such a detriment to white persons' use of the park as to frustrate the trust and cause it to fail, would be a violation of the said Fourteenth Amendment. (A. 242-243)
>
> • • •
>
> An application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because the agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially non-discriminatory basis. The use of such a judicial sanction in these cir-

cumstances would violate the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (A. 399)

—6—

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States require that the racially exclusionary words of Senator A. O. Bacon's will relating to Baconsfield Park be treated by the courts as *pro non scripto* as though they were never written. This is required, firstly, because the racially exclusionary terms were written in the will to conform to racially exclusionary suggestions and requirements of Georgia Code Section 69-504 (Georgia Acts 1905, p. 117). The racial portions of Section 69-504 are void under the Fourteenth Amendment, and indeed were void *ab initio* even under the "separate but equal" doctrine, by authorizing the total exclusion of Negroes from public parks, and thus must be regarded as *pro non scripto.* Secondly, it is required because by the City's acceptance of the park, pursuant to Georgia Code Section 69-505 (Georgia Acts 1905, pp. 117-118), and its operation of the park in accordance with Bacon's will, the will was made a part of the City's own laws governing the operation and use of the park, and is to be treated in the same manner as if the racially exclusionary words appeared in a city ordinance. (A. 399-400)

—9—

By virtue of all the facts and circumstances presented on the record of this case the City of Macon has so invested the Baconsfield Park with a public

> character, and the City has become involved to such an inextricable extent, that it would be a violation of the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment for the state courts to apply any state law doctrines (whether relating to trust law, the law of dedication, real property law, or other principles), so as to defeat the rights of the intervenors to racially nondiscriminatory use and access to the park as a public park (R. 401-402)

Before the Superior Court the constitutional claims were argued orally and were presented in full written briefs. The ruling of the trial court on petitioners' constitutional arguments was brief and general. The court stated in its order of May 14, 1967 (A. 519-520):

> It is my opinion that Shelley vs. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

The federal questions were preserved on appeal by appropriate enumerations of error and again fully briefed before the Supreme Court of Georgia. The Supreme Court of Georgia also rejected petitioners' constitutional arguments on the merits. The court stated at the conclusion of its opinion (A. 545):

> 6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Supreme Court of Bibb County holding that the trust has failed and the property has reverted to Sen-

ator Bacon's estate by operation of law. We recognize the rule announced in Shelley v. Kraemer, 334 U.S. 1 (68 SC 836, 92 LE1161, 3ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recreational area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discriminatory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

Summary of Argument

Federal law entirely governs the crucial issues in this case. As both venerable and recent decisions of this Court established beyond doubt, no area of state law and no action of any state agency, whether in the field of trusts or anywhere else, is immune from total control by the Constitution. Petitioners contend that the Fourteenth Amendment has been violated in this case, thus tendering a purely federal question. *Martin* v. *Hunters' Lessee*, 1 Wheat. 304 (1816); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, US , 37 U.S.L. Week 4107 (1969).

The action of the court below violates the Constitution in that it imposes a drastic forfeiture on the mere fact of the City's compliance with federal law. The only possible excuse for this (an excuse whose extreme doubtfulness need not be argued in this case) would be the testator's definite command, but the record unequivocally shows, and the court below admits, that the contingency now dealt with in this way never entered the testator's mind and that he made no provision, definite or indefinite, for action such as that taken by the court below. Thus, it is the choice of the Georgia court, that this reversion is to occur on a showing that Negroes must be allowed to use the park. Aside from its naked character as a penalty on municipal compliance with federal law, this action constitutes a strong potential encouragement of racial discrimination. Petitioners, as Negroes in whose favor the constitutional guarantees primarily run, and as citizens of Macon who will lose a public park if this reverter is enforced, have standing to rely on this ground. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Crandall* v. *Nevada*, 73 U.S. (6

Wall.) 35 (1867); cf. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953).

Secondly, since the intended white beneficiaries of Bacon's trust may still use the park as freely as ever the judgment that the "uses of the trust" have "failed" (Georgia Code §108-106(4)) must logically rest on the premise that for Negroes to use it as well so impairs white enjoyment as to produce "failure." The record is absolutely silent on this impairment, so that the premise is one of pure law. Cf. Mr. Justice Stewart's concurring opinion in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726 (1961). This is beyond question a proposition on which no state court judgment can be allowed to rest, under the Fourteenth Amendment, for it goes even further than an "assertion" of Negro "inferiority." *Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880). It is immaterial that this proposition doubtless was not consciously present in the Georgia court's mind: it is a proposition logically necessary to the conclusion that the "uses" of this trust—enjoyment by whites—have "failed" (Georgia Code §108-106 (4)) when all that has changed is that Negroes in uncertain numbers may be present. Having, under Georgia law, an easy alternative to this decreeing of "failure," in the Georgia *cy pres* statutes, the Georgia court refused to use it, a decision which logically must rest on a proposition very similar to the one just identified. See *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U.S. 230 (1957); *Pennsylvania* v. *Brown,* 392 F.2d 120 (3rd Cir. 1968), cert. denied, 391 U.S. 921 (1968).

Thirdly, the discriminatory provision in Bacon's will was incurably tainted by its evident connection with §69-504 of the Georgia Code authroizing racial discrimination and only racial discrimination in trusts for public parks. A provision so tainted ought to be unusable, not merely

affirmatively, but for any practical purpose. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); see Mr. Justice White's concurring opinion in *Evans* v. *Newton*, 382 U.S. 296 (1966).

Fourthly, the racially discriminatory term in Bacon's will should be treated as a nullity, *pro non scripto*, for two reasons. The first reason is that it was intended to become and did actually become a part of the public law material of the city of Macon; its character as such (evident enough in any case) is incontestably established by Georgia Code §69-505. Having this character, it should simply be stricken, as a city ordinance commanding racial discrimination would be stricken. *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955). The second reason is that this park, which by Georgia law was beyond any doubt "dedicated in perpetuity" to the whites, must by virtue of the federal command of racial equality be "dedicated in perpetuity" to the blacks. The park, by virtue of this federally commanded addition to Georgia law, then stands "dedicated in perpetuity" to all.

All of the above arguments are greatly strengthened and reinforced by the impressive showing in this record of long-continued and heavy public involvement in the park's maintenance and control.

ARGUMENT

I.

Introductory: State and National Law.

One overriding point must initially be made. Respondents have introduced into this case, in their Brief in Opposition to Petition for Certiorari, at p. 15 and *passim*, an idea that seems to govern strategically the view of the case which they would have this Court take:

> Respondents submit that the petition for a writ of certiorari should be denied because the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. No rights guaranteed petitioners by the Fourteenth Amendment have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this court in *Evans* v. *Newton*, 382 U.S. 296 (1966).
>
> This Court has scrupulously adhered to the rule that the highest court of a state may administer its statutory and common law according to its own understanding and interpretation (see, e.g., *American Railway Express Co.* v. *Commonwealth of Kentucky*, 273 U.S. 269 (1927)), and especially where the law which is being administered by the state tribunal is property law (see *Tyler* v. *U. S.*, 281 U.S. 497 (1930)), or where the case involves the construction of a will. As this Court stated in *Lyeth* v. *Hoey*, 305 U.S. 180, 59 S.Ct. 155 (1938):
>
> "The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and *the state courts*

settle their construction." 59 S.Ct. at 158. (Emphasis supplied.)

At the very beginning, in application to each and every argument that is to follow, petitioners deem it necessary to confront this idea (surely valid as far as it goes) with its obvious and beyond all doubt equally valid limitation—that no state law and no state act, in any field, from automobile traffic to contingent remainders, can prevail in the face of federal law, and that no state court holding can stand in the way of a federal court's examining the fact and truth of any transaction, for determining whether, in practice and not only in theory, the Constitution has been violated. The Constitution protects against *actions,* and not only against maladroit or erroneous classifications and concepts. This has been clear at least since *Martin* v. *Hunters' Lessee,* 1 Wheat 304, 357-360 (1816); *Indiana* ex rel. *Anderson* v. *Brand,* 303 U.S. 95 (1938). Petitioners have no interest in questioning the *general* right of the Georgia court to deal with trust questions. But when it is claimed, as petitioners here claim, that the *particular* dealing at bar violates, in multiple ways, the Fourteenth Amendment, it is entirely unresponsive to set up the general proposition that state courts ordinarily deal with these matters, where federal law is not implicated. U. S. Constitution Article VI.

Respondents' own cases, cited in the just-quoted passage from their Brief in Opposition, in fact illustrate not only the general proposition, but also the exception. In both *Tyler* and *Lyeth,* having paid due respect to state law and state courts, this Court went on to say and to hold that these cannot control the incidence of federal taxation. See *Tyler* v. *United States,* 281 U.S. 497, 503 (1930); *Lyeth* v. *Hoey,* 305 U.S. 188, 193 (1938). Unless the Fourteenth Amendment is of lesser dignity than a tax statute, the very same thing is true in this case.

The Georgia court has the general power to say when, *under Georgia law*, a trust has terminated. But that only opens, and does not by any means close, the question whether the Georgia court's holding, in all its bearings and on all the facts, results in a violation of the Fourteenth Amendment.

It is very striking that no longer ago than last Term the Georgia court's decree declaring a trust to be terminated was in this Court reexamined, in the light of a claim that the action violated the First Amendment, and unanimously reversed—Mr. Justice Harlan concurring specially not because of any belief that Georgia controls her own trust law without the necessity for responding to the federal Constitution, but solely because of a desire to state his understanding of the limits to the holding on the merits. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, U.S. , 37 U.S.L.W. 4107 (1969). This recent case should finally leach out any lingering chemical trace of the notion that a state court has some special plenary power over trusts, without entire subjection to federal constitutional norms.[1]

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[1] The recently decided case of *Pettway* v. *American Cast Iron Pipe Company*, —— F.2d —— (5th Cir., No. 25826 May 22, 1969), involved a trust created by the owner of the business. He willed the entire company in trust to his employees in 1924, with certain racial conditions as to the composition of those bodies responsible for management. While the case itself contained no issues regarding this trust and was decided on grounds altogether unconnected therewith, it does suggest an interesting question. Suppose the owner of a business were, in 1924, to have willed that business in trust to his employees with a provision in the trust instrument to the effect that no Negro should ever be employed by the company. After the passage of the Civil Rights Act of 1964, such a provision would clearly become unlawful and could not be followed. Is it possible that this Court would allow a state court to decree the reversion of the company to the heirs of the settlor on the ground that state courts were a law unto themselves when it came to the question of whether a trust had terminated?

The absolutely general subjection of state judgments to federal norms could be illustrated over a range as wide as the history of the Republic. Perhaps it is enough to cite *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964), where the state libel law—normally, of course, a matter of state concern—was in effect drastically revised to make it chime with the federal Constitution. As this Court said in that case, in words equally applicable to this case: "It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute." 376 U.S. at 265.

The petitioners in this case are putting forward definite claims that the action of the Georgia court violates the Fourteenth Amendment in a number of ways. These claims cannot be answered by suffusing the discussion of them with a general feeling-tone of deference to the Georgia court's dealings with trusts. If no important or substantial federal claim is present in this case, then the writ of certiorari was improvidently granted. If one or more substantial and important federal questions are present, then this Court alone, on the record before it and on the uncontroverted facts in that record, is the one final authority on the question whether what has been *done*—and not merely what the Georgia court has said has been done—violates the Constitution.

All the arguments that follow point to different aspects of a single plain factual pattern: by testamentary disposition and by Georgia law, in intricate and intended coaction, a public park was limited to whites. The flagrant unconstitutionality of that limitation is conceded by all. By the present decree of the Georgia court, this provision is nevertheless given a drastic affirmative effect. The question whether such an effect can be given to a flagrantly unconstitutional set of arrangements is a federal question, and only a federal question.

II.

The Decree of the Court Below Violates the Fourteenth Amendment, in That It Is Hostile to and Infringes Petitioners' Right to Continue to Enjoy Public Facilities Without Racial Discrimination.

A. The Decree of the Georgia Court Imposes the Drastic Sanction of Reverter on Compliance With the Fourteenth Amendment, and in so Doing Infringes Upon a Federal Interest Declared and Created by the Constitution, at the Same Time and by the Same Act Inflicting Detriment on the Petitioners and Encouraging Racial Discrimination.

The immediate contemporary facts presented by this record are simple and *prima facie* damning. A park was being operated by the city of Macon as trustee, and by a Board of Managers appointed by the City Council. The Fourteenth Amendment says that Negroes may not be excluded from a park so operated. Macon accordingly allowed Negroes to use the park. Upon this showing, the Georgia court decrees the extreme penalty[2] of forfeiture of the property.

On the face of it, this constitutes a direct and drastic interference by the state of Georgia with a course of events charged with that high and positive federal interest which attaches to the commands of the Constitution. It is the command of the Constitution that all races use any park run by the City, or by a Board of Managers appointed by the City, or by both in coaction. This command, like all constitutional commands, states and implements a na-

[2] Petitioners choose "penalty" as the handiest word for what the action taken undoubtedly is—the imposition of a drastic and detrimental consequence on a showing that Negroes must be allowed to use the park. It is the fact and not the word that matters. Cf. Brief in Opposition to Certiorari, p. 18.

tional interest. State power in no form, and on no state-law doctrinal basis, may take action hostile to a federal interest so expressed, or penalize that which the Constitution commands. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1867); cf. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); and *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

It is quite beside the point that if this park be forfeited the exclusion of Negroes might *thereafter* not constitute a violation of the Fourteenth Amendment, for *it is the forfeiture itself*, decreed by the Georgia court in this case, which constitutes the sanction hostile to the federal constitiuonal command.[3]

It is clear, in addition, that this action of the Georgia court will operate widely as a discouragement to expeditious and voluntary compliance with the Fourteenth Amendment, and will encourage racial discrimination, *contra* the decision in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). If this Georgia decision stands, it will be taken as a strong precedent supporting the proposition that state courts may generally decree reversion of property for breach of racial conditions. The use of this device by draftsmen, and compliance by those placed *in terrorem*, will undoubtedly be significant.

Where, as here, the reverter occurs as to public property, Negroes will be discouraged from asserting their rights, since they will know (and doubtless will be told) that such assertion would be a futility, since reversion would attend their success; this might be of little significance in Macon, but it might well be highly significant in small communities with few Negro inhabitants. Cities, reciprocally, would be

[3] This is the sufficient answer to respondents' point in their Brief in Opposition, p. 17, first full paragraph.

encouraged to evade as long as possible their duty to integrate. Where a trust instrument or deed so much as raised a doubt as to its interpretation or validity, the plain duty of non-discrimination might be evaded by prolonged and exhausting litigation.

A potential discouragement of racial equality need not be absolutely certain or highly substantial in order to offend the Constitution. See *Robinson* v. *Florida*, 378 U.S. 153 (1964), where the fact that a restaurateur, if he should desegregate, would be directed to put in separate toilets, was held sufficient discouragement to make unconstitutional his discriminatory rule. The effect of the affirmance of the present decree would beyond question relate to a higher order of magnitude than the effect of the regulation in *Robinson*.

It is true that the detriment here imposed for failure to keep Baconsfield white is not one finally avoidable by keeping Baconsfield white, since that is forbidden by the Fourteenth Amendment. It might be argued, then, that the sanction of reverter does not in this case foster racial discrimination, since the racial discrimination involved cannot permissibly occur in any case. The consequence of this argument would seem to be an absurdity—that a state may impose any forfeiture it likes on the performance of a compelled federal duty, even though it cannot impose any forfeiture on the same act when that act is not a federal duty. If the argument had force, a state could fine a man, in a moderate sum, for paying his federal income tax, since he has to pay that tax anyway, and hence cannot be influenced not to pay it by the fear of a small fine. Sound federalism is not built of such scholastic spiderwebs. The imposition by a state of a forfeiture, on a showing that a federally imposed duty has been or will be performed by a municipality, is as noxious an interference

with national supremacy as can well be imagined. U. S. Constitution, Art. VI; see *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Crandall* v. *Nevada*, 73 U.S. 35 (1867).[4]

A state which would thus impose a drastic forfeiture of property as a penalty for obedience to the Constitution, and, moreover, do so in a way that effectively discourages the assertion of federal rights and encourages their denial, must surely come forward with some justification. The only justification even specious must be looked for in Senator Bacon's will. On examination, there are here two possibilities, one of which is totally and clearly demurrable, and the other of which, being entirely unsustained by the record, is admitted by the Georgia court not to exist in fact.

First, Senator Bacon clearly and seriously desired that Negroes be excluded from this publicly operated park. But neither he nor any other person has any lawful power to command such a result. That result can be attained only by the repeal of the Fourteenth Amendment. Senator Bacon's desire in this regard is no more effective in law than would have been an express direction that a colored citizen of Macon chosen by lot stand in the stocks in the park every Sunday. There can never have been any doubt about this, since at least 1956, and no party connected with this case ever seems to have doubted it, but any possible doubt was laid at rest by the decision of this Court in *Evans* v. *Newton*, 382 U.S. 296 (1966).

A quite different expressed or implied desire of Senator Bacon might be brought forward as justification for what

[4] Reference is here made to footnote 1 above. Unless it be true that a state court may validly decree forfeiture of property for the violation of any directions of a settlor, though compliance with those directions would constitute a flagrant violation of national law, there is no possible way to sustain the judgment in the case at bar.

has been done; it might be said that Senator Bacon intended, desired, or willed the destruction of the park and the reversion of this property to his heirs if Negroes had to be allowed to use the park. If such intent was discernible, or inferable, an interesting question would be presented. The categorical fact is, however, that Senator Bacon's intent, desire, or will in this regard is unknown and unknowable, and in overwhelming probability never was so much as formed. The Georgia court admits this unmistakably, saying that the reversion which it decrees occurs "because of a failure of the trust, *which Senator Bacon apparently did not contemplate and for which he made no provision.*" (A. 543) (emphasis added). Respondents make the same admission in their Brief in Opposition to Certiorari at p. 23.

Despite these admissions, which entirely cover the ground, it will be useful briefly to show how thoroughly unknowable Senator Bacon's intent in this regard must remain.[5] First, the Bacon will, and this whole record, are

[5] Petitioners are here so laboring this point because respondents, in their Brief in Opposition to Certiorari, *passim*, have sought to convert this case into one involving the mere "construction" of a will. On the only point that matters—whether Bacon would have preferred the total collapse of his plan for a park to the presence therein of Negroes—the will contains no basis for "construction." Curiously, respondents virtually concede this, citing a passage from Scott on Trusts which says that, in circumstances like these, "all the court can do is to make a *guess* not as to what he intended but as to what he would have intended if he had thought about the matter." Brief in Opposition, p. 23. (Emphasis supplied.) The very passages from Bacon's will which respondents quote (Brief in Opposition, pp. 4-7) state as solemnly as language can do his wish that the property be kept a park forever. Respondents ask, then, that this Court respect a "construction" of a will which the Georgia court itself admits has no basis in a demonstrated or in any way knowable intent of Senator Bacon, and which respondents themselves virtually concede to be a mere guess. *Any* action at this time will necessarily do violence to Senator Bacon's expressed intentions; it is to the last degree misleading to stress that

absolutely silent on this point. One must therefore recur to the probabilities. The question (an unanswerable one) then is: Would this Georgian who died over fifty years ago prefer to have his lovely farm remain as a park with some Negroes using it along with whites, or would he prefer to have it become mere city real estate, fully alienable, subject to all the vicissitudes affecting such property through the decades and centuries? On the latter alternative, Negroes certainly cannot be excluded. If a restaurant is opened on the property, Negroes must be served. If rent property is erected, Negro tenants cannot be rejected. If there are sidewalks, Negroes cannot be kept off them. If a church is erected, a mixed couple may be married in it. Senator Bacon's announced ground for his exclusionary policy—the prevention of "social relations" among the races—cannot be attained, even as to this property, by a reversion, except for so long as it remains completely "private" and in the hands, by chance, of a special sort of "private" owners. What wise lawyer in 1911 would have thought that alienable city real estate, descending from heir to heir, could be kept completely "private," and in the hands of those who would prevent racial interrelation?

Senator Bacon, moreover, formed and expressed his desire for racial exclusion against a background of seemingly permanent and general racial separation. His desire for his park was congruent with the social system in which he lived. If he had known that separation of the races in public facilities of all sorts was to become impossible in

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one action—maintenance of the park with Negroes in it—will violate Senator Bacon's will, while utterly submerging the fact that the *other* action—destroying the park forever—will also cardinally violate Senator Bacon's will. It is submitted that, while a state court may "guess" as it wishes on matters federally indifferent, no state court, on the basis of a mere "guess," can destroy a public facility on a showing that Negroes must use it.

Georgia, would he have preferred to let his farm become city real estate rather than let it be a park conducted on the same lines as all other public facilities in the State?

Of course, no one can know the answer. Contrary to suggestions in the respondents' Brief in Opposition to Certiorari, petitioners do not themselves pretend to be able to answer, and are not asking this Court to answer, either *de novo* or by second-guessing the Georgia court. What petitioners assert, on the contrary, and what they take to be conceded, is precisely that no one can give the answer—whether approving or disapproving of Bacon's "social philosophy." (Brief in Opposition, p. 19.) What petitioners insist is that it is clearly shown that Bacon *did not* choose between reversion and Negro presence. No one, then, is left to choose, except the Georgia court. Its choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a "guess," an item in "social philosophy," or anything else at all.

No party in this case, as it now stands, has any claim to be considered as the agent of Senator Bacon's wishes. The admission of the Georgia court to this effect is compelled by the record.

The state of Georgia, having acted through its courts to decree forfeiture of public property on a showing that Negroes have used it and must be allowed to use it, cannot (and does not), therefore, proffer the justification that it is merely carrying out the command of a private testator.[6] The only possible justification remaining is that the reversion occurs "by operation of law." But law "operates" as a human act; in this case the act is that of the Georgia court. Cf. *Erie R.R.* v. *Tompkins*, 304 U.S. 69 (1938).

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[6] It is highly questionable whether even that justification would suffice, but petitioners need not here argue the point.

For a more recent illustration even more directly concerned with the case at bar, see the language quoted above at p. 39 from *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964). Georgia may have any rules of trust law she desires, declaring these by statute or by judicial decision. Or she may, if she wishes, have no law of trusts at all. The one reservation is that no state law, particular or general, legislative in origin or judicially fashioned, concerning "failure of trust" or concerning anything else, may penalize obedience to federal law. (See *supra*, I.) The ruling below does just that.

It cannot make any difference that the Georgia court, or the respondents, choose to look on the case as one where the trust "merely" fails. The "failure" of a trust, like the termination of a fee, is not a happening in the order of physical nature, which a court observes and records. It is a holding in the legal order, which the court by its decision declares and enforces. The actuality is that application is made to the *court* for affirmative judgment, and it is that affirmative judgment which, to all intents and purposes, brings about and even constitutes the "failure." In application to the present case, this point is highly practical as well as soundly philosophic; no one could possibly have guessed what the status of this park was to be until the Georgia court declared its reversion.

In their Brief in Opposition to Certiorari, at pp. 19 and 25, respondents cite *Charlotte Park and Recreation Commission* v. *Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956), wherein the North Carolina court gave effect to an *explicit provision* for the determination of a fee upon use of a golf course by Negroes. Of course, that case has no authority here, on familiar principles applicable to the denial of certiorari. It was, more-

over, decided before the thorough-going effect of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and its sequel cases, was felt in the state courts. Even so, properly read, it tells strongly against respondents' position. For, while it gave effect to a termination clause that *explicitly* provided for termination on use by Negroes, it refused to decree termination with respect to a second deed which clearly provided (as clearly as Senator Bacon's will) that Negroes were not to use the golf course, but which failed *expressly and in just those words*, to provide for termination on the happening of this event. 88 S.E.2d at 124. On the level of federal law, this is a most meaningful distinction. Petitioners do not concede (the point not being in issue here) that even an express provision for termination may be judicially implemented. But the state court is playing a far more active role than that—as the North Carolina court seems to recognize—when it *supplies for the parties* a provision for termination that is not in the instrument. That is just what the North Carolina court would not do, and just what the Georgia court has done. The difference is a federal-law difference, for it is a difference in the degree or even the kind of affirmative action by a state agency.

These petitioners have standing to assert the ground developed in this section. The constitutional norm against racial discrimination, obedience to which is being penalized here, runs primarily in their favor. Cf. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). These petitioners have, in addition, a direct and substantial interest in the treatment of the claim they here assert; if it is upheld, then the decree pronouncing reversion of this property is reversed, the park continues as a park, and these petitioners are (by force of the Fourteenth Amendment) entitled to use that park. *Evans* v. *Newton*, 382 U.S. 296 (1966). They have standing,

then, in both senses of the term—they are the centrally intended beneficiaries of the rule they invoke, and they will in fact benefit substantially from its application in this case. Furthermore, they are citizens of Macon, and the destruction of this park, though brought about formally by the divestiture of the city's title, falls substantially on them.

Although petitioners have standing, it is worthwhile noting how very widespread would be the impact of the penalty here imposed on the City's performance of its Fourteenth Amendment duty. In taking away this park, Georgia destroys values built up by many persons and entities. The City has spent money on the park—money contributed over the years by its citizens. The tax immunity enjoyed by this park has been, in effect, a huge subsidy at the expense of taxpayers of all races. The federal government has contributed to the creation and to the improvement of the park, in part after an *express* certification that it was a nondiscriminating public facility (A. 440-441). The decree of the Georgia court destroys all these values, repudiates this certification, and wipes out the deep and total public character which decades of maintenance and subsidy have given to Baconsfield—without any definite warrant for this step in Bacon's directions, and solely on the showing that the Negro members of the public may now use this public place.

It should be noted how profoundly the present record differs in this respect from the spare record in *Evans* v. *Newton, supra.* There, the case came up on the pleadings. Here, a full record has been made, and is before this Court, of prolonged public dedication and deep, multi-level governmental involvement. The step the Georgia court has taken constitutes the destruction of a facility in the widest

and profoundest sense public; the penalty for admitting Negroes falls on the past and the future.

B. The Judgment That This Trust Has "Failed," Though Its Intended Beneficiaries May Still Enjoy Its Benefits Just as Before, Can Rest Logically Only on the Proposition That, as a Matter of Law, the Presence of Negroes Spoils a Park for Whites, an Impermissible Ground Under the Fourteenth Amendment. The Rejection of the Cy Pres Alternative Must Rest on Substantially Similar Grounds.

The judgment of the Georgia court in this case must stand logically on a ground which the Fourteenth Amendment forbids any agency of the state government to occupy. Under Georgia Code §108-106(4),[7] this trust ends, and a resulting trust for the heirs arises, only if the "uses" of the trust "fail." The holding, on analysis, then, must rest on the proposition that, as a matter of law, the presence or proximity of Negroes, in any number, causes the "use"—enjoyment by whites of a public amenity—to "fail." This premise, as to the Negro race, is worse than "an assertion of their inferiority." *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880). It is an assertion of their obnoxiousness. The Fourteenth Amendment strikes down a state decision resting, by irresistible implication, on such a shocking ground. See the opinion of Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). Just as, in *Burton*, there was no suggestion in the record that appellant was "offensive" to other customers, so there is no suggestion

[7] Ga. Code §108-106(4) provides:

"*Trusts implied, when.*—Trusts are implied—

* * * * *

4. Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs."

in this record that petitioners' presence "offends" whites to the extent of "frustrating" the purpose of a trust established for the benefit of the latter. Here, as there, the offensiveness of the Negroes is supplied, in effect, as a matter of law.

(Petitioners here would emphasize that they are not putting forward the suggestion that the members of the Georgia court held this idea in their minds; there is no reason whatever for any imputation of that kind, and petitioners would be sorry to be thought to have made it. What is being urged here is that, on a proper analysis, the *logical* implication of the holding turns out to be as petitioners here urge.)

The affirmative "purpose of the trust" established by Senator Bacon is not left obscure by him. It is the furnishing of a public park to the whites of Macon. That purpose has not to any degree been "frustrated," or "failed," in the normal sense of either of those words. *The whites of Macon may still resort to Baconsfield just as freely as ever.* There is not one scintilla of evidence in this record showing that the admission of Negroes as well either has diminished or faintly threatens to diminish the enjoyment of Baconsfield by whites. (If such evidence were ever to be offered in a proceeding of this sort, this Court would then have to consider whether such an issue of fact could ever be made in an American court.) The conclusion that this trust, clearly set up for the benefit of the whites of Macon, no longer benefits them, thus "frustrating" the affirmative purpose of the trust, causing its "uses" to "fail," must therefore rest on a conclusion, in effect one of law, that Negroes spoil a park for whites.

The only faint (and, it is submitted, illusory) hope of escape from this conclusion lies in the assertion that the

exclusion of Negroes was itself a "purpose of the trust"—that is, one of the chief objects of its establishment, one of the "uses" which has "failed." But to assert this is to assert a great absurdity, an absurdity too great to hide behind any generalities about "deference" to state courts; who would leave land in trust *for the purpose* of excluding Negroes, or "declare" such exclusion as a "use"? Georgia Code §108-106(4). It is also to impute a truly sinister design to Senator Bacon, a design altogether inconsistent with his expression of friendship for the Negro race. To call the exclusion of Negroes by Senator Bacon part of "the purpose of the trust" is to confuse the affirmative object he had in mind with a provision, incidental though of course important in his eyes, as to a collateral matter.

Confusion, but easily dispellable confusion, may be created by the fact that Bacon's will uses the word "sole. . . ." See respondents' Brief in Opposition to Certiorari, p. 27. But the adjective "sole" does not denote a mode or degree of enjoyment or use. Unpacked, it says no more than that Negroes are to be excluded. It does not in any way differ in its reference from an explicit and separate provision for their exclusion, and does not make it any the less "the purpose of the trust" that the whites of Macon shall enjoy Baconsfield.

The Georgia court, in its opinion, repeatedly declares that the purpose of this trust was the furnishing of a park for Macon whites, e.g., "It is clear that the estator sought to benefit a certain group of people, white women and white children of Macon . . ." (A. 540); "the beneficiaries being "the white women, white girls, white boys, and white children of the City of Macon . . ." (A. 541); "Senator Bacon . . . selected a group of people, the white women and children of the City of Macon, to be the ob-

jects of his bounty, in providing them with a recreational area." (A. 545).

Elsewhere, the Georgia court several times speaks of the total failure of this purpose, e.g., ". . . we are of the opinion that the *sole purpose* for which the trust was created has become impossible of accomplishment . . ."; ". . . the *sole purpose* . . . had become impossible of accomplishment . . ." (A. 539, 542; emphasis supplied).

It is interesting that these passages recognize and emphasize the unitary and simple character of this trust's object; it had a "*sole purpose.*" But the passages previously quoted tell us, correctly, that this "sole purpose" was the furnishing of a park to the whites. There is no way whatever, therefore, to justify the judgment of the Georgia court, except on the basis that, as a matter of law, the proximity of Negroes destroys the value of the park for whites, for it is only on this assumption that the "uses" of the trust may be said to have "failed." That is the certain "hidden major premise" of the Georgia court's holding. (It is, of course, not petitioners' assertion that this proposition was consciously present to the Georgia court's mind, p. 51 *supra.*)

It is to be observed that this is emphatically not a case in which the court was asked to give effect to a provision for reverter or for the determination of a base fee, in the event of Negroes' occupying or otherwise using property. (Cf. *Charlotte Park and Recreation Commission* v. *Barringer,* 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956), and the discussion *supra*, pp. 47-48.) That case can be decided when it is reached. Not even informally, not even by implication, did Senator Bacon provide for this reversion. (For full discussion of this point, and the Georgia court's admission thereon, see above, p. 43 et seq.)

It is then not Senator Bacon's will, in either sense of the word, that is being enforced. It is 1968 Georgia decisional law, and nothing else, that declares that a reversion is to be decreed when Negroes must be admitted to a place where a testator, in a will fifty-seven years old, has said they are not to go—though that testator did not himself provide for a reversion.

To sum up at this point, Georgia law provides for a resulting trust, in cases of this sort, only where the trust has "failed." Georgia Code, §108-106(4). This trust can be said to have "failed" only on one of two hypothesis:

(1) It was its "purpose"—its affirmative purpose in the sense that "failure" to attain that purpose is "failure" of the whole trust—to exclude Negroes. This is at once a sinister and an absurd interpretation, one to be rejected as soon as clearly stated. The Georgia court never espouses it; there is no indication Senator Bacon espoused it. For a state court to decree the forfeiture of property on such a premise would be to implement and support in the most drastic way a particularly noisome form of racism—and in this case to do so without one grain of support in the record for the settlor's having held such a view.

(2) It was the "purpose" of the trust, affirmatively, to furnish a park for white people, but that purpose "fails" *even though white people may still use the park,* because Negroes may also use it. Whatever words one uses to describe the evaluation of Negro presence on which this alternative must rest—nuisances, obnoxious, detriments to enjoyment—the inescapable assumed premise is that, as a matter of law, the presence of Negroes causes white enjoyment to

"fail." This is an impermissible ground under the Fourteenth Amendment.

If the Georgia court had had no alternative, under its state law, to decreeing reverter whenever *all* the particular terms of any trust could not be fulfilled, then a question of some complexity would be presented. We are spared the effort of unraveling this remedial tangle, for Georgia law very plainly provided the court below with means of escape from a holding that a park must revert, and the underlying trust be treated as "failed," merely because some Negroes may now join the whites who continue to be beneficiaries in fact as well as in law.

The Georgia law of *cy pres* is codified in two sections of the Georgia Code:

> 108-202. *Cy pres.*—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will *as nearly as possible* effectuate his intention. (Emphasis supplied.)
>
> 113-815. *Charitable devise or bequest. Cy pres doctrine, application of.*—A devise or bequest to a charitable use *will be sustained and carried out* in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particualr mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose *in a manner most similar* to that indicated by the testator. (Emphasis supplied.)

On their face, these statutes seem not so much to make possible as to command application of *cy pres* to just such

a situation as the one which confronted the Georgia court in this case. As far as §108-202 is concerned, it is entirely plain that continuance of the trust on a nondiscriminatory basis effectuates Senator Bacon's intention "as nearly as possible." There would be, indeed, a large variance from his intention, but that variation, however large, would be as small "as possible" under the Fourteenth Amendment. Under §113-815, the application of *cy pres* to this case would have carried out the general directive of the first clause, and operation of the park on a nondiscriminatory basis would, again, amount to its operation in the "manner most similar" possible to that which Bacon directed.

The Georgia court, in the opinion below, treats quite briefly the contention that *cy pres* should have been applied—not citing either of these statutes. Only one case, *Ford* v. *Thomas,* 111 Ga. 493, is cited—for the proposition that the doctrine "cannot be applied to establish a trust for an entirely different purpose from that intended by the testator"; on examination, all that case held was that insufficient effort had been exerted to fulfill the purpose the testator stated.

It is stressed in the opinion that Senator Bacon desired the exclusion of Negroes—a point conceded by all, and one only opening the question whether *cy pres* should have been applied.

Respondents, in their brief in the Georgia court, say that the "one Georgia case we find to be of significance is *Adams* v. *Bass,* 18 Ga. 130." That case, decided before the Civil War, voided a trust for the resettlement of Negro slaves in free states, on the ground that the particular states named by the testator would not admit them. Of this case, perhaps the best thing one can say is that it was decided before the adoption of the present Georgia

code or of the Thirteenth and Fourteenth Amendments. It represents a low point in failure to apply *cy pres*, and contravenes flagrantly the letter and the spirit of the present Georgia code.

After *Adams* v. *Bass*, no Georgia case has been found in which a trust was allowed to fail, when beneficiaries and trustee were still in being, and when the intended benefit could still be received, merely because the trust could not be carried out in the manner directed by the settlor, or because its benefits were extended to a larger class, without in any way diminishing the enjoyment of the intended beneficiaries.[8] The very least one can say, therefore, is that the Georgia court was not bound by any of its precedents, by any of its statutes, or (as it concedes) by anything dispositive or even suggestive in Senator Bacon's will, to choose not to save this trust. The state court was entirely free, *and indeed was forced,* to make its *own* choice, as an agency wielding state power, between that action (the application of *cy pres*) which would have saved the trust, and that action (the one it took) which would destroy the trust and with it the petitioners' rights, as citizens of Macon, to resort to the park.

Not quoting or even citing either of the Georgia *cy pres* statutes, respondents stress that *cy pres* is an "intent-enforcing doctrine." As these Georgia statutes show, *cy pres*, at least in Georgia, could more precisely be described as an "intent-varying" doctrine, for these Georgia statutes take hold *only* where the known intent of the settlor *cannot* be fulfilled. More fundamentally, however, this case is not one to which the concept of intent-enforcement is relevant. It would be impossible for a testator, short of signing his

[8] Respondents speak of the case at bar as having been decided under "well-settled principles of Georgia law," Brief in Opposition to Certiorari, p. 15, but cite no cases, anywhere, to back this up.

name in blood, to indicate more clearly than Senator Bacon did his wish that this land remain forever a park: "And I conjure my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved for the uses and purposes herein indicated . . ." (A. 21). At the same time, he very clearly indeed intended that Negroes be excluded, and gave reasons for that desire—just as he gave reasons for wanting the land to remain a public park. The concept of "intent-fulfillment" is nonsense when applied to these equally clear and quite contradictory "intents." Under these circumstances where the intent of the testator must in any case be grossly violated, all the *cy pres* doctrine can do is to open to a court the *choice* as to which violation is to occur.

We have to construct the rationale necessary to explain logically the court's ruling, for the grounds it gives are little, if any, more than conclusory. But these grounds can be constructed with certainty—not in the sense that they were consciously present in the mind of the Georgia court, which petitioners do not assert,[9] but that they are logically necessary to the holding.

It is submitted that, in deciding not to apply *cy pres* to this trust, the Georgia court necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust and for the perpetual maintenance of the park as such. This policy decision, by the court, was inescapable. For the only other person who could have decided it was Senator Bacon, and he did not decide it. The Georgia court concedes that he did not decide it (see p. 44, *supra*). The

[9] See *supra*, p. 51, first full paragraph.

record would not support a finding that he decided it, but would, on the contrary, conclusively show that he did not decide it.

It does not avail to stress (as the Georgia court, in its brief treatment of the *cy pres* contention, stresses) that Senator Bacon very seriously desired to keep Negroes out of Baconsfield. The Georgia statutes, on their face, clearly provide for *cy pres* in the very case, and only in the very case, where the settlor's intent *cannot* be given effect. The question posed to the Georgia court, then, was not whether *cy pres* would fulfill Senator Bacon's whole intent, but whether the variation from that intent was *undesirable enough* to inhibit the use of the clearly available device of *cy pres*. The judgment of the Georgia court, under whatever view of state law taken, is therefore a judgment that forfeiture of this park and total failure of Senator Bacon's scheme is to be preferred to the admission of Negroes.

Georgia's *cy pres* statute merely opens the way to an unavoidable choice between these alternatives; neither they nor anything else in Georgia law compel the choice made. As to ordinary state law questions of this form, it goes without saying the Georgia court's choice would be final. But in this case the choice was made in a direction which clearly implies [10] an estimate that racial mixture is crucially undesirable, so undesirable that the whole carefully constructed scheme for a park is not to be saved. Such a decision is wrong as a federal-law matter.

To sum up, then, this state court had first to decide whether this trust was to be declared to have "failed"; its "failure," if any, consisted in nothing more or less than the admission of Negroes to enjoy the park along with the intended beneficiaries, *who still could themselves fully enjoy*

[10] But see *supra*, p. 51, first full paragraph.

it. Secondly, having (as petitioners contend, impermissibly) chosen to declare "failure," the Georgia court chose to reject the *cy pres* alternative clearly tendered it, thereby inevitably espousing the proposition that enjoyment of a park by whites *in the absence* of Negroes so fundamentally differs from enjoyment of a park by whites *in the presence* of Negroes as to go not to the question of "exact manner" (Ga. Code §108-202) or "particular mode" (Ga. Code §113-815), but rather to the essence. Since the essence of enjoyment is enjoyment, this must in turn imply that the presence of Negroes, as a matter of law, critically impairs white enjoyment. The ground for declaring "failure" of the trust, and the ground for rejecting *cy pres,* came down then (as one would expect) to much the same ground—a ground profoundly insulting to Negroes, and hence impermissible under the Fourteenth Amendment. *Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880).

C. Confronted with the Unavoidable Necessity of Choosing Between Senator Bacon's Two Contradictory Wishes, the Georgia Court Impermissibly Chose to Give Effect to That Part of His Will Which Was Incurably Tainted by Its Having Been Drawn Under Georgia Code §69-504. This Choice Constituted a Preference of the Unconstitutional Over the Constitutionally Unobjectionable Alternative.

As Mr. Justice White maintained in his concurring opinion in an earlier decision in this case, *Evans* v. *Newton,* 382 U.S. 296, 302 (1966), ". . . the racial condition in the trust . . . is *incurably tainted* by discriminatory state legislation validating such a condition under state law." 382 U.S. at 305. (Emphasis supplied.) Cf. 382 U.S. at 300, fn. 3, where the majority discusses the same theory. This incurable taint goes not only to the availability of the tainted provision for producing the result it primarily aims at, but also makes it improper for the Georgia court, ineluctably

faced (as we have shown) with making its own choice between the tainted and the untainted provisions in Bacon's will, to choose to give strikingly preferential effect to the tainted provision, by treating it as tantamount to a direction that the trust be terminated on its violation. The provision "incurably tainted" ought to be given no effect whatever; certainly it should not be enlarged by construction into a direction for termination.

Georgia Code §69-504, passed a few years before Senator Bacon drew his will, reads as follows:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

> *Gifts for public parks or pleasure grounds*:—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

It is submitted that Mr. Justice White correctly held that "This case must . . . be viewed as one where the state has forbidden all private discrimination except racial discrimi-

nation." 382 U.S. at 311. The background of §69-505 makes clear its functioning as an affirmative facilitation of racial discrimination.

The Georgia Code of 1895, the first relevant item in that background, names no category including parks as a subject of charitable trusts. The 1895 Code enumeration (not materially different from present Ga. Code §108-203) is as follows:

> §4008. (3157.) *Subjects of charity.* The following subjects are proper matters of charity for the jurisdiction of equity:
>
> 1. The relief of aged, impotent, diseased or poor people.
>
> 2. Every educational purpose.
>
> 3. Provisions for religious instruction or worship.
>
> 4. For the construction or repair of public works, or highways, or other public conveniences.
>
> 5. The promotion of any craft or persons engaging therein.
>
> 6. For the redemption or relief of prisoners or captives.
>
> 7. For the improvement or repair of burying-grounds or tombstones.
>
> 8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

"The promotion of human civilization" would seem a pretentious statement of the objective of a park; for a state court to hold that segregating a park constitutes such a promotion of civilization would violate the Fourteenth Amendment. No "construction or repair" is the principal

subject of this trust. No Georgia court ever held any part of this section applicable to a park, in all the years before §69-504 became law. This really is enough to establish the entire uncertainty, in the Georgia law, before §69-504, of the validity of a trust for a racially discriminatory park.

Authoritative summarization of the general law of trusts for parks confirms this view, e.g.,:

> 4. *Other Public Purposes.*—Other public purposes not in the ordinary sense *benevolent*, may be valid charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for defraying the necessary expenses of local administration which rest upon the inhabitants of a designated region. 4 Pomeroy, Equity §1024.

There being no Georgia cases, this synthesis of the "common law" elsewhere is significant. The park, where held a public charity, is so held because it benefits the *whole* public, or because its receipt free of charge, lightens the expense of the performance of a *governmental function.* The upholding of racially exclusive parks, as objects of public charity, would be a contradiction in terms on the first of these theories, and the second of them so deeply implicates the charitable trust in the governmental plan as to make its enforcement plainly obnoxious to the Fourteenth Amendment.

Thus, as one would confidently expect when so carefully drawn a statute as §69-504 is put through the state legislature, the prior Georgia law was at least doubtful. It is against the parts of that law that were not doubtful that §69-504, and its operation, are to be judged. A very clear

role can be assigned this statute when one adverts to the law of parks in Georgia, as plainly seen in the old Georgia cases.

Apparently no Georgia case had dealt with a charity involving a park. But plenty of Georgia cases had dealt with parks, treating them, as the common law traditionally does, as lands "dedicated to the public," the members of the public, as such, having easements of enjoyment in them.

The leading case, never lost sight of in later opinions, is *Mayor and Council of the City of Macon* v. *Franklin*, 12 Ga. 239 (1852). In a luminous opinion, Judge Nisbet learnedly reviews the doctrine of "dedication," concluding:

> Dedications of lands for charitable and religious purposes, and for public highways, are valid without any grantee to hold the fee, and the principle upon which they are sustained, sustains dedications of streets, squares and commons. *City of Cincinnati* vs. *The Lessee of White*, 6 *Peters'* R. 435, 436. *Beatty* vs. *Kurts*, 2 *Peters'* R. 256. *Town of Paulett* vs. *Clark*, 9 *Cranch*, 292. *Lade* vs. *Shepherd*, 2 *Stra.* 2004. 12 *Wheat.* 582.
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> • • • • •
>
> That commons and squares are subjects of dedication and under the principles which govern streets and highways, see the great case of *The City of Cincinnati vs. White's Lessees*, 6 *Peters*, 431. *Watertown* vs. *Cohen*, 4 *Paige* R. 510. *State* vs. *Wilkinson*, 2 *Vermont* R. 480. *Pearsoll* vs. *Post*, 20 *Wend.* 111. 22 *Wend.* 425. (12 Ga. at 244-45.)

The holding of the case was that the city of Macon might not sell for a private use land which it had itself "dedicated" to the public as a public square or common.

Other Georgia cases treat public parks and analogous tracts as "dedicated," with reciprocal public easements. *County of Gordon* v. *Mayor of Calhoun*, 128 Ga. 781 (1907), decided a few years after the passage of §69-504, shows that the Georgia court, which had apparently never dealt with a park as the subject of a charitable trust, thoroughly knew the "common," with its accompanying public easements, as the legal device by which parks were maintained as such. See also *Pettit* v. *Mayor and Council of Macon*, 95 Ga. 645 (1894).

There was, however, one difficulty, not much felt, perhaps, in 1852, the year of *Macon* v. *Franklin*, but later a cloud that could have been seen on the horizon. The "dedication" that creates a public park is *to the public as a whole.* Georgia law was of one voice on this, *Ford* v. *Harris*, 95 Ga. 97, 100 (1894); *East Atlanta Land Co.* v. *Mowrer*, 138 Ga. 380, 388 (1912); *Western Union Telegraph Co.* v. *Georgia Railroad and Banking Co.*, 227 F. 276 (S.D. Ga. 1915). The concept of "dedication" left no room for selecting parts of the "public" to enjoy the public easement; there was no middle ground, conceptually, between the public use, comprehensive as to the public, and the private easement, an unsatisfactory legal basis for operating a public park.

The expectable trouble developed, not as to parks, but as to the analogous case of the cemetery. In *Brown* v. *Gunn*, 75 Ga. 441 (1885), "persons of color" claimed, as members of the public, the right to be buried or to bury their dead in a cemetery they contended had been "dedicated" to the public. The court held, on the facts, that no "dedication" had taken place, but there was no suggestion, in the opinion, that such "dedication" could conceivably, as a matter of law, have been to the white public only.

This, then, was the background of §69-504:

1. No provision in the purportedly exhaustive Code enumeration authorized the setting up of a charitable trust for a park.

2. The "common law" of the subject, outside Georgia, generally rested the inclusion of parks in the subject-matter of charitable trusts on two grounds, one of which was incompatible with racial exclusion and the other of which so deeply involved the interests of government in the operation of the park as to make it likely that "state action" would be found.

3. No Georgia case had ever held a park, racially restricted or not, to be the proper subject of a charitable trust.

4. Georgia's public parks were conceived as "dedicated" commons, with corresponding public easements. This concept, thoroughly familiar to the Georgia court, had no room for restriction to parts of the public. Thus, the only sure and well-travelled way of giving one's land for a public park—"dedicating" it to the public—contained no means of enforcing a racial restriction.

5. In at least one case that got as far as the state's highest court, Negroes, asserting the very claim so irresistibly suggested by all the foregoing, had sought to enjoy their easement in "dedicated" property, and had been turned away only on a narrow finding of fact.

Petitioners urge that the situation defined by these numbered points was the one §69-504 was designed to meet, because it is the very situation to which it appears to address itself. It reads and sounds like remedial legislation, and if it was, this was what it was designed to remedy. In any

case, this is the legal background against which it became law.

Against that background §69-504 is no longer a puzzle. That section supplies the one thing needful—permission to give land as a park with racial restrictions—and it supplies that alone. Before it was passed, anybody who wanted to give his land as a park for the whole public could "dedicate" it, in the time-honored way. *The single practical change* the section made was that he now could restrict his gift racially —not in general or in any way he wished, but only racially.

The 1905 statute, then, by the leave and only by the leave of which this racially restrictive term was inserted in Senator Bacon's will, was a specifically hostile state act against the colored race, authorizing clearly, for the first time in Georgia law, their exclusion from parks otherwise public. That was its minimum effect. Here we have what one would never have expected to encounter in such explicit clarity, literally that very thing which Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 at 727 (1961), found by inference: ". . . This legislative enactment . . . authorizing discrimination based exclusively on color." Here is no mere general declaration of a right to discriminate on any grounds, but rather on the one hand the lending of Georgia's law's sanction, for the first time so far as one can tell, to charitable trusts for public parks, with the proviso that racial discrimination and that discrimination alone, is to be permitted—and, on the other hand, the plugging of a loophole that had made racial discrimination difficult in the law of public parks as it actually existed in Georgia.

This is the minimum effect of this statute. But is it not also clear that, against this background, any citizen must see that the state is at least suggesting discrimination? Is

this not the necessary effect of such a statute? If it were merely declaratory of one consequence of a general capacity in testators to discriminate in any manner, must it not for that very reason function as a mark of the state's special interest in this form of discrimination? Cf. *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). Against the legal backdrop that actually existed, on the other hand, it must surely signal to all a state policy of fostering and favoring segregation, evidenced in the most convincing manner by solicitude to make such segregation possible against all previous objections of a technical cast. As this Court held in *Anderson* v. *Martin,* 375 U.S. 399, 402 (1964), striking down a law which encouraged racial discrimination at the polls, "placing of the power of the State behind a racial classification that induces racial prejudice" violates the Equal Protection Clause.

Finally, a careful lawyer, seeing in §69-504 his only reliable Georgia authority for setting up a trust for a park, might well be afraid to count on a later time's reading of a statute so clearly racial in its thrust. The verbal problem he would have would not be that of the meaning of the word "may." The problem would be whether the act which, under the statute, the testator "may" perform is (1) the conveyance of land for a park with or without any of the conditions enumerated; or (2) the conveyance of the land together with the one he chooses from among those conditions. Stranger feats of stautory construction have been performed than a court's reading this language to have the latter meaning.

The general point is not, however, the only reliance in this case. What Senator Bacon actually did, in the first instance, was to leave his land in trust as a park for the *white women and children* of Macon (R. 19). Now §69-504, on its face and with no ambiguity whatever, fails to au-

thorize a gift *to women and children on an unsegregated basis.* It authorizes a gift for white women and children only, *or* for colored women and children only, *or* for women and children of any other race only, but none for women and children of all races together. Had Senator Bacon, therefore, wished to leave his park for *all* women and children, he would have had to conclude that he could not lawfully do so under §69-504, and that if he tried to do so on an alternative "common law" theory he would be met not only by all the difficulties above discussed, but also by the powerful argument that this carefully drawn statute, enumerating permitted discriminations, excluded others by implication. The Board of Managers, to be sure, later opened the park to all whites. But Bacon could not have known they would, and authorized them not to. Under §69-504, he could not have authorized them to include all women and children.

The actual effect of all this on Senator Bacon's mind is not important. *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963). What is important is that the state of Georgia, in passing this statute:

> (1) Supplied the specific thing its law had lacked—a clear means for a private person's giving his land for a "public" park on racially discriminatory terms.
>
> (2) In the context of prior law, signalled the State's anxious interest in seeing racial discrimination (rather than mere general "freedom of choice") authorized and practiced.
>
> (3) Engendered legal doubt that any trust for a park would be valid without racial discrimination, and, unless its readable text and normal implications be ignored, made flatly unlawful the non-racist rule of admission—"women and children only"—corresponding

to the racist rule—"white women and children only"—actually adopted in this case, thus in effect commanding segregation by race if a "women and children" park was wanted.

It would seem clear that such a statute does "incurably taint" a discriminatory provision drawn under its authority. The only question that remains, in the present posture of the case, is whether the "incurable taint" really is incurable, or whether a miraculous recovery has occurred. Is the racial condition "tainted" only as far as its direct affirmative thrust goes, while the same provision is untainted when a court seeks to use it as the only ground for destroying this public park? The question is a new one, but it is a question not of state law but of the effect of a federal constitutional taint. Petitioners submit that that which is "incurably tainted" by constitutional infirmity ought not to be usable for *any* purpose, on the obvious ground that *any* use of such a provision in some way gives practical effect to that which ought to be without effect. Cf. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

If this tainted condition drops out of the will, then reversion is clearly impossible.

D. At Least Under the Highly Special Circumstances of This Case, the Provision for Racial Discrimination in Baconsfield Ought, as a Matter of Federal Law, Under the Fourteenth Amendment, to Be Treated as Absolutely Void. If This Is Correct, Then Federal Law Commands That This Trust Be Continued and That the City Continue as Trustee, for It Is Clear That Without the Racially Discriminatory Language Georgia Law Compels That Result. Similarly, Federal Law Commands That a Public Park "Dedicated" to the White Public Be "Dedicated" to the Negro Public as Well.

Senator Bacon's will, as we have just seen, was drawn under the then recently-enacted authority of the present Georgia Code §69-504, quoted *supra*, p. 61.

The will looked backward, then, to recently enacted state legislation for its indispensable authorization. (Compare the argument developed in C, *supra*.) Even more important, so far as the argument about to be developed is concerned, on its face it clearly looked *forward* to further and quite centrally important official connection with state power, for it provided that the city of Macon should be trustee and that the City Council should appoint the Board of Managers for the park. When the city of Macon accepted this position, the racially discriminatory provisions in the will became tantamount to city ordinances—part of the normative material promulgated and espoused by the City with respect to the conduct of this public park.[11] Senator Bacon, an eminent

[11] No special weight is intended to be placed on the word "ordinance." The crucial point is that the "no-Negro" rule became, by the City's acceptance of the trust, a rule which the City (or the Board of Managers appointed by the City, or both) had accepted and had the duty of enforcing. It can hardly make any difference that the City, by accepting the trust, had in some sense bound itself to keep this rule in force. Whatever the rule's claim to permanency, it was certainly a part of the publicly espoused rule-material governing this city park, and had become that by the City's action as well as by the action of Senator Bacon. Cf. Respondents' Brief in Opposition to Certiorari, pp. 31-32.

lawyer, knew and clearly wished that this part of his will would speedily gain this official status as part of the City's rules with respect to the operation of its park. It would seem quite artificial to treat such provisions at any stage in their rapid and intended progress from explicit statutory sanction toward the status of being, in effect, ordinances, in a manner different from that in which one would treat ordinances themselves. Indeed, their character as "mere" expressions of Bacon's will was merged in their character as quasi-ordinances on the day the city of Macon accepted the trust.

This point is driven all the way home by Georgia Code §69-505, in force when Bacon drew his will, when he died, when the City accepted the trust, and during the whole life of Baconsfield as an all-white park:

> 69-505. Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, *and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive use and enjoyment thereof.* (Emphasis added).

How is it possible, in the light of this language, to see these provisions as not having the character, intended and achieved, of public law? Under this statute it is the *conveyance itself* that gives the restrictions their public law character.

But is it not clear that a city ordinance, commanding exclusion of a race from a large park, would simply be stricken? Could a Georgia court be permitted thereafter to close the park and give the property back to the former owners, on the ground that the known or declared "purpose" of the laws about parks was the provision of parks on a discriminatory basis? See *Griffin* v. *County School Board,* 377 U.S. 218 (1964). Would not any public-law material declaring such a "purpose" have to be similarly stricken?

It is submitted, therefore, first, that Senator Bacon's directions about the discriminatory conduct of Baconsfield were intended by him to achieve very quickly the status of city ordinances, and they did in fact achieve and hold that status, under §69-505 and by virtue of the City's becoming trustee. Secondly, it is submitted that their status in this regard makes it suitable to treat them as unconstitutional city ordinances or other public-law rules are always treated —i.e., as nullities. If they are nullities, then there is not and never was any colorable ground for termination of the trust or for the City's resignation. When they are stricken, what remains is a public park.

It is worth pointing out that there lurks in this argument no problem about the retroactivity of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and its sequel cases, outlawing segregation even where "separate but equal" facilities were provided. The part of §69-504 which authorized racial exclusion, since it obviously made possible the creation of city parks without provision for separate equal facilities, was unconstitutional on its face even under *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). The exclusion of Negroes from Baconsfield, a public park run by the City, was unconstitutional even under *Plessy* v. *Ferguson, supra,* unless separate but equal facilities were in fact provided; this

record shows none, and it can hardly be that the burden rests on those excluded from one city park to show *affirmatively* that no "equal" park is furnished. Senator Bacon's testamentary provision for exclusion of Negroes rested, then, on an unconstitutional statute, and both contemplated and induced an unconstitutional action (at least so far as this record shows) by Macon—under 1910 standards as well as under 1969 standards.[12] It would seem quite artificial not to treat a provision so sandwiched as though it were itself unconstitutional, to be stricken as a matter of federal law, as one would strike out the part of §69-504 on which it rested, and the discrimination it contemplated and created.

This conclusion, in a deep but true sense, may be seen to rest on the philosophy of *Marsh* v. *Alabama*, 326 U.S. 501 (1946). That case held that, where a person opens his or its property to the public, or to a governmental use, there attaches an obligation to respond to the norms of the Constitution, as these regulate governmental action. It would be harmonious with this philosophy to hold that as soon as a testator, like Bacon, publishes a will giving his property to serve as a public park, and even goes so far as to make the City of Macon his trustee for this purpose, so as to effect the incorporation of his rules for running the park into the City's own fabric of law, then these directions, if repugnant to the Constitution, are to be treated as official rules repugnant to the Constitution normally are treated—by looking on them as null and void. A constitution which forces color-blindness on the city ought to be held to force

[12] In any case, the provision, and the City's consequent §69-505 powers, were evidently unconstitutional long before this litigation started. *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957). Besides, the public-law character of the racial provision, and its consequent *amenability* to such constitutional norms as might develop, were fixed from the beginning.

color-blindness on one who both proposes to use and succeeds in using the city as agent of his will.

More in fairness to Senator Bacon's memory than in strict relevance to this point, it should again be emphasized that there is no reason whatever for thinking that Senator Bacon would have disagreed with the indicated result, as matters now stand. We simply have no way of knowing whether, if he had been told that this park could not be operated at all on a discriminatory basis, he would have chosen that it be operated for all. Treating his racial directions as *pro non scripto,* as the nullities they would unquestionably be if considered as sections in a city code, may, for all we know, do far less violence to what his wish would have been than is done by the Georgia court in awarding Baconsfield to his heirs, for such fate as marketable city property may have—including likely occupancy, and even ownership, by Negroes. The choice to overthrow his scheme *in toto* is not one that can be justified by respect for the wishes of a dead man; his choice, among the choices now open, is not knowable or even probably inferable. (For fuller discussion, see *supra* at pp. 43-46.) The choice is solely that of the 1968 Georgia court. And it is submitted that as a matter of federal law that court ought to be held to treating the racial exclusionary provisions as nullities.

The underlying assumption, in the very similar case of *Commonwealth of Pennsylvania* v. *Brown,* 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968), involving the Girard College Trust, seems clearly to be that the word "white," in a will turning property over to the public for a public use, is to be treated as a nullity, as a matter of federal constitutional law. A judgment of affirmance in the case now at bar would have the absurd result of inviting a suit by the Girard heirs, or as many as could be found, for a reversion. Cf. *Sweet Briar Institute* v. *Button,* 280

F. Supp. 312 (W.D. Va. 1967), rev'd *per curiam*, 387 U.S. 423, decision on the merits, 280 F. Supp. 312 (1967).

Another and rather closely parallel route to considering this racially restrictive language as a nullity is to be found in the fact that this park, having unquestionably been "dedicated" to the white public under *Georgia* law, must, as a result of the *federal* command of equality, be taken to have been "dedicated" to the Negro public as well.

The regular way of creating a public park in Georgia, prior to the enactment of Georgia Code §69-504, was by dedication to the public, with reciprocal public easements. See *Macon* v. *Franklin*, 12 Ga. 239, and the summary on this point in this Court's opinion in this same case, *Evans* v. *Newton*, 382 U.S. 296, 300, n. 3 (1966). (Cf. also point C, *supra*.)

Section 69-504, enacted in 1905, while permitting racial discrimination, expressly retains the concept of "dedication":

> *Gifts for public parks or pleasure grounds.*—Any person may by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance *dedicated in perpetuity to the public use* as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by

such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.) (Emphasis added.)[13]

Now, when this park passed into the trusteeship of the city of Macon, thereupon it became the fixed right of all Negro citizens of Macon to be treated, with respect to their rights in the park, just as the white citizens were treated. This record shows no "separate but equal" facilities, in 1914 or at any other time. The enjoyment of easements by whites, but not by Negroes, in a park under city trusteeship, was therefore unconstitutional even under *Plessy* v. *Ferguson.* (See *supra*, pp. 73-74.) It can make no difference that Negroes were not positioned in knowledge or in power to enjoy their rights.

But even if it be thought that this arrangement was not unconstitutional under *Plessy*, and even if (contrary to the general rule) *Brown* v. *Board of Education, supra,* and cases following are not taken as declaring the rule that had been correct all along, but only of force prospectively, it is nevertheless indisputable that, at some time years prior to this litigation's commencement, it became clear that as a matter of federal constitutional law, the Negro citizens of Macon must possess, in respect of this city-trusteed park, just exactly the same rights, intangible as well as tangible, as the white citizens of Macon.[14] Since it cannot be contested, under §69-504, that the park has been through all

[13] It is hard indeed to see how, in the face of this language respondents can contend that this park was not "dedicated" to the white public. But see Brief in Opposition to Certiorari, p. 34.

[14] See *Holmes* v. *Atlanta,* 350 U.S. 879 (1955); *Mayor & City Council of Baltimore* v. *Dawson,* 350 U.S. 877 (1955); *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U.S. 230 (1957).

these times "dedicated" to the use of the *whites*, it must equally, by operation of federal law, be taken to be "dedicated" to the use of *blacks*—not because Georgia law ordered that result (for it did not), not because Senator Bacon intended that result (for he did not), but because federal law, *in commanding equality*, necessarily commanded that result.

Since the point of "dedication" was raised in the assignments of error in the Georgia Supreme Court, and since it was fully briefed there, it is surprising to find that it is not dealt with in that court's opinion. There is a brief reference in the opinion to the Order and decree of the Bibb County Court; the passage referred to is thus the only place one can look for a reasoned statement of the Georgia court's grounds for rejecting the "dedication" argument:

> It is clear that the testator sought to benefit [the whites] and the language of the will clearly indicates that the limitation to the class of persons was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public.

It is petitioners' contention, as just set out, that this conclusion is wrong, not as a matter of state law, but as a matter of federal law, for the precise reason that it takes no account of the fact that federal law commanded *equal* rights —whether as holders of easements, or as beneficiaries of "dedication"—for Negroes. As a net integral sum, adding the effect of Bacon's will, under Georgia law, to the effect of federal law on the situation thus created, Baconsfield must be held "dedicated" to all.

If Baconsfield, then, by the joint operation of Georgia and federal law, was "dedicated" to use as a park by whites

and by non-whites, then it seems plain that under Georgia law that dedication is not retractable. Granting *arguendo* that the purpose of Senator Bacon's *trust* has failed (but see above, point B), the *uses* to which the park is "dedicated" have not failed.

Some confusion may be created by the juxtaposition of the concepts of "dedication" and "trust." These concepts are not at war under Georgia law—or, for that matter, under Anglo-American law in general. Section 69-504, just quoted, makes it plain that Georgia law sees no difficulty in lands being *both* under trusteeship *and* dedicated to the public. For the "appropriate conveyance" under §69-504 may be in fee simple *or* in trust, but whichever of these sorts of conveyances is chosen, the lands are to be "dedicated in perpetuity to the public use. . . ." There is no difficulty about this double aspect of the creation of a park. The legal title to land may be held by a trustee, and the duties of his (or its) trusteeship may include, for example, maintenance, while simultaneously the land may be "dedicated" to the public, with public easements upon it. These arrangements are complementary and not contradictory. Somebody, whether or not a trustee, always holds underlying title to land over which easements run.

The holding, then, that Baconsfield was not to be treated as "dedicated" to the public, with all that must imply under Georgia law, rests essentially on a wrong reading or disregard of the federal command of equality. Such a holding obviously cannot be allowed to stand.

The thoroughness of the "dedication" in this case is emphasized (if emphasis be needed) by reference to the public subsidies and aids this park has received. The record abounds with details of maintenance, tax exemption, and even substantial city and federal aid. State power com-

pelled and solicited these aids, and can have done so only on the theory that the park was "dedicated" as a park. It would be anomalous in the extreme for that same state power, acting through a different agency, now to be allowed to say that this park was not, after all, "dedicated" to a public use.[15] And if it was dedicated to a public use, it was necessarily dedicated to use by all races, under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Georgia ought to be reversed.

Respectfully submitted,

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[15] See *supra*, pp. 49-50.